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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 721

CLAUDINE MCFARLIN and LEONARD MCFARLIN,
Petitioners.

v.

CHICAGO, ROCK ISLAND and PACIFIC RAILROAD COMPANY,
A CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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WILSON - EPES PRINTING CO - RE 7-6002 - WASHINGTON 1, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray the court that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on August 28, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, *infra*, page 18, is reported in 336 F. 2d 1.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 28, 1964, page 4 of the record, page 23, Appendix B. This petition is filed within 90 days from the date of judgment. Jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the decision of the Circuit Court of Appeals conflicts with New Mexico law as to the duty of care to be exercised by a motorist in approaching a railroad crossing, in a case where the motorist has stopped, looked and listened.

2. Whether what is "reasonably" effective care in stopping, looking and listening in approaching a railroad crossing is a question of fact or of law.

3. Whether circuit court can re-examine and weigh conflicting facts and substitute its findings of fact or inferences therefrom contrary to the verdict of the jury.

4. Whether the circuit court can deny the right of jury trial to the petitioners as guaranteed to them by the constitutions of the United States.

5. Whether respondent waived right to ask for judgment notwithstanding the verdict by not moving for a directed verdict at the close of all the evidence.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

"In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

2. The statutory provisions involved in this case are:

(a) Rules of Decision Act, 28 U. S. C. Section 1652, which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

(b) Rule 50 of The Federal Rules of Civil Procedure which reads as follows:

> Rule 50—MOTION FOR A DIRECTED VERDICT
>
> (a) When Made: Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.
>
> (b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the

reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Rule 75 (h) of the Federal Rules of Civil Procedure which reads as follows:

(h) POWER OF COURT TO CORRECT OR MODIFY RECORD. It is not necessary for the record on appeal to be approved by the district court or judge thereof except as provided in subdivisions (m) and (n) of this rule and in Rule 76, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental

record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the court of appeals.

STATEMENT OF THE CASE

The petitioners, wife and husband, residents of New Mexico brought suit in Quay County, New Mexico, for damages resulting from negligence of the respondent, a foreign corporation, in permitting weeds to grow at a public crossing as to obscure the view of an approaching motorist and in negligently operating a train which struck Claudine McFarlin's auto.

Respondent removed the claim to the United States District Court for the District of New Mexico, invoking jurisdiction by reason of diversity of citizenship and claim in excess of $10,000.00.

The respondent has a grade crossing upon a public road which it is necessary for petitioners to cross to go to their home. The crossing has a crossbuck warning sign but is otherwise unguarded. On July 12, 1960, the petitioner, Claudine McFarlin attempted to cross the crossing and was struck by a train of respondent. The weeds had reached a heighth of about five feet and thereby obscured the vision of Mrs. McFarlin, whose eye level in the car was four feet three inches. The weeds had reached this heighth over a period of a few days prior to Julv 12, 1960. (R. 27) Mrs. McFarlin had crossed the track going north that morning but had not crossed the track going south, in her auto, for several days. She had crossed going south in a school bus but her eye level in the bus was six feet so as to be above the top of the weeds. She did not therefore know the extent to which her vision would be obstructed when she was in the car going south. (R. 27).

She was driving east on a highway and then turned off on a roadway and stopped about 150 feet from the crossing to get her mail. (R. 33). She walked to the mailboxes which were 190 feet from the crossing, got her mail, and returned to the car where she looked at some of her mail. She glanced to the west but could not see down the tracks because of the weeds. (R. 27) She proceeded south in low gear to the crossbuck warning sign where she stopped, looked and listened which was 15 feet from the tracks. (R. 18) The weeds blocked vision to the east and the west. (R. 18) She eased up a bit and was clear to the east but still couldn't see to the west. (R. 18) She eased up a bit more, thinking she would clear the weeds, and saw the train approaching from the west and heard the whistle. (R. 18) She thought she might be in a point of danger (R. 18) but did not know for sure if she was too close. (R. 30) She attempted to shift into reverse and the motor stalled. The overhang of the train struck the front fender of the car.

All witnesses agreed that the weeds were bad and obstructed vision. The train engineer high in the train cab and above the weeds said he did not see the car until the front of it emerged from the weeds. (R. 82) There was a variance of testimony as to what distance the train whistle was blown and at what distance the train was braked. A special agent for respondent testified that the weeds would block or obscure the vision of a person in a car on the roadway. (R. 138-139).

One witness, Henry Pilley, testified that he was about 25 feet behind Mrs. McFarlin when she stopped at the crossing. He had previously stated he was on the shoulder of the highway (R. 59) which would be 190 feet away and five feet higher than the crossing, as the roadway drops about five feet from the highway to the crossing. At another time he testified he was at the mailbox when Mrs. McFarlin was about 30 feet from the crossing (R.

65) which would be some 160 feet. At another point he testified he was about 100 feet from her (R. 72) He also heard the whistle when the train was approximately 175 to 200 feet from the crossing (R. 71) and thought he heard it before that but could not give the distance. (R. 77). Mrs. McFarlin heard it when the train was 300 feet from the crossing. (R. 19) Mr. Pilley was in a pickup truck and was therefore in a better position to see, because you sit up higher. (R. 69)

At the close of plaintiffs case respondent moved for a directed verdict which was denied as to the count on negligence, contributory negligence, and proximate cause. Respondent moved for a dismissal upon close of its evidence. Motion was overruled. The respondent then rested. (R. 146) Petitioners then presented rebuttal evidence.

The jury returned a verdict for $8,800.00 for Claudine McFarlin for personal injuries and $12,960.00 for medical expenses and loss of wages to Leonard McFarlin, as head of the community. Respondent moved for judgment *n.o.v.* which was overruled by the trial court. Respondent appealed. Prior to hearing in the Circuit Court petitioners filed a motion in the Circuit Court to correct the record to include testimony contained in a partial transcript not contained in Volumes 1 and 2, as certified, to show the rebuttal testimony.

The Circuit Court reversed and remanded with instruction to enter judgment for the respondent notwithstanding the jury verdict. The motion to correct the record was not expressly ruled on except that the court, in footnote 1 of the opinion, stated that the motion for a directed verdict was renewed at the close of all the evidence.

REASONS FOR GRANTING THE WRIT

The Circuit Court held "the New Mexico Supreme Court has established a course of conduct for a traveler approaching an open, unguarded railroad crossing which requires him to stop, look and listen for trains using the tracks, and the act of looking and listening must be performed in such manner as to make it reasonably effective." Citing *Morehead* v. *Atchison, T. & S.F. Ry. Co.*, 27 N.M. 349, 201 P. 1048; *Sandoval* v. *Atchison, T. & S.F. Ry. Co.*, 30 N.M. 343, 233 P. 840; *Blewett* v. *Barnes*, 62 N.M. 300, 309 P2d 976; *Landers* v. *Atchison, T. & S.F. Ry. Co.*, 68 N.M. 130, 359 P2d 522.

The Circuit Court then adds, "The New Mexico Courts have approved what is commonly known as the "Pennsylvania Rule" announced in *Baltimore & Ohio R. Co.* v. *Goodman*, 275 US 66, 56 A.L.R. 645." The *Goodman* case held, in effect, that a person *had* to see an approaching train even if required to descend from the truck or be negligent as a matter of law. Apparently the Circuit Court applied this reasoning stating that Mrs. McFarlin's looking *had* to be effective and her listening *had* to be effective and that as she did not see or hear the train until she cleared the weeds she was negligent as a matter of law. Otherwise the question of what was "reasonably effective" would still be a jury question.

The *Goodman* case has been limited by this court in *Pokora* v. *Wabash R. Co.*, 292 U.S. 98. Insofar as setting a "fixed standard" to be applied by the judge, Justice Cardozo said:

> The opinion in Goodmans case has been a source of confusion in the federal courts to the extent that it imposes a standard for application by the judge and has had only wavering support in the courts of the state. We limit it accordingly.

In the *Landers* case the court, by way of dicta, did say that, in effect, the doctrine of the *Goodman* case was applied in the *Morehead* case, but then the court said:

> However in Russell v. Davis, 38 N.M. 533, 37 P2d 536, we said, in a case involving a highway intersection accident, that the standard of conduct of one approaching an intersection is the same as that of one approaching a railroad crossing and is the care and conduct of a prudent person under the circumstances.

The *Morehead* case holds that the traveler must exercise care to make the act of looking and listening *reasonably* effective and it is respectfully submitted that the New Mexico court has not gone further than to hold that the traveler must stop, look and listen in a reasonable manner and that it has not adopted the judge made standard of the *Goodman* case, nor the law as applied in the instant case that even if a person exercise care in stopping, looking and listening that the question of what is reasonably effective is for the court rather than for the jury. Reasonably effective does not mean 100% effective unless it is to be said that the ordinary prudent person is always 100%.

Only in cases where the traveler did not stop, look or listen or exercise any care in so doing has the New Mexico court said that it was a matter of law. In the *Morehead* case the plaintiff had been to a party until midnight when he drove to a cafe. The cafe was 57 feet from the crossing. He said he looked and listened at this point. The cafe was closed and after about one-half minute drove off and did not thereafter stop, look or listen before going on the tracks.

In the *Sandoval* case the driver did not stop, did not look, and did not listen and the court said he was grossly negligent. In the *Blewett* case that driver had been

to a party and was returning home at 1:20 a.m. He drove his car onto the tracks without looking right or left, did not see the crossbuck sign, and crossed 3 sets of tracks before the collision on the 4th without altering speed or course. The court said, "to summarize the evidence he did not stop, look, or listen but drove blindly upon the crossing, and that due care required 3 things: stop, look and listen.

In the above three cases the driver did not stop, look, or listen. They are, indeed, distinguishable from the conduct of Mrs. McFarlin who did stop, did look, did listen and approached the track cautiously. The trial judge said, "Now it may be argued that Mrs. McFarlin didn't exercise any care because she drove onto the track or at least too close to the track before she had a clear vision, but at least there is testimony which if believed, is to the effect that she stopped back by the crossbuck and that she inched forward slowly, that she attempted to listen, attempted to look and in view of that, I am going to submit that feature to the jury." (R. 125)

In the *Landers* case the vision was not obstructed except by a signal box and a telephone pole. Another difference was that there was a flashing device that was not working. The driver stopped, looked and listened but did not see the engine. He started slowly across the tracks and while astride the tracks saw and heard the engine and was struck. Although the court pointed out that this was a guarded crossing and the failure of the warning device to work was a circumstance to consider, the court said where the traveler exercised some care it was a question of fact for the jury to determine, not one of law for the court. It is significant that although the driver looked and did not see the train and listened and did not hear the engine this was not held to convict him of contributory negligence as a matter of law.

In a retrial, *Landers* v. *Atchison, T. & S.F. Ry. Co.*, 73 NM 131, 386 P.2d 46, the court said that an instruction asserted to be based on the *Morehead* case was not appropriate. They did not go any further to say that the instruction as drawn was appropriate in any case.

It also seems significant that in the *Landers* case citing *Russell* v. *Davis, supra,* the court held that where reasonable men may fairly differ on the question as to whether there was contributory negligence or not, the determination of the fact is for the jury, Citing *Padilla* v. *Railroad Co.*, 16 N.M. 576, 120 P. 724. In the *Padilla* case the driver was killed and had the benefit of the presumption that he stopped, looked and listened. There was evidence that deceased could have seen the train if he had looked in that direction. There was also evidence tending to show his view was obstructed by trees, weeds and an irrigation ditch. The court held that where reasonable men may differ upon the question as to whether there was negligence or not, the determination of the fact is for the jury and laid down the following principle of law:

> The law governing the duty of a traveler upon a public road approaching a railway crossing is too well settled to need any extended discussion at this time. It is settled that it is the duty to approach cautiously and carefully, using his faculties of sight and hearing.

Equating the presumption of care in the *Padilla* case with the actual proof of care in the present case the application of the law should be the same, that is, not a fixed or arbitrary judge made standard but one of reasonable care.

On these decisions it is respectfully submitted that insofar as the Circuit Court opinion is based on the *Goodman* case and fixes a standard that a person *must* see a train, if there is one, that it conflicts with New Mexico law that if a person stops, looks, and listens and does so

in a reasonable manner that the question of contributory negligence is for determination by the jury considering all the circumstances, and state law is controlling. *Erie R. Co.* v. *Tomkins*, 304 U.S. 64.

A substantial majority of cases in the courts of New Mexico involve questions of negligence, contributory negligence and proximate cause. Many of these involve at least one automobile and the question presented is of importance to the courts of New Mexico as well as to the citizens of New Mexico and many other persons traveling in New Mexico. In many cases federal jurisdiction is present and it is the experience of counsel that an increasing number of cases are being removed from local courts to the Federal court by the defendants. The effect of the Circuit Court opinion would be to effectively deny to any person involved in a train collision any right to relief or redress in the courts. The principle involved is of sufficient importance that the petition should be granted for review by this court.

2. Taking the decision of the Circuit Court as based on the *Morehead* case but cleared of the overcast of the *Goodman* case, and accepting the *Blewett* case holding that due care requires three factors, that is, stopping, looking, and listening, the question is whether the act of looking and listening so as to be reasonably effective is a jury question. It is respectfully urged that what is or is not reasonable is to be determined from all of the circumstances as a question of fact and not of law.

3. As set forth in the statement of the case, the evidence clearly raised the issue whether or not Mrs. McFarlin acted in a reasonable manner in her conduct in stopping, looking, listening, and cautiously approaching the crossing. It is respectfully urged that the Circuit Court in its opinion narrates testimony and inferences which were disputed or unwarranted by the evidence and

is no less than the courts adoption of facts or inferences contrary to the facts found by the jury.

The Circuit Court said, "After she left the main highway, the train was in full view, but she made no attempt to look to the west until she stopped at the point where the weeds obstructed her view." This is contrary to the evidence that the weeds extended the width of the right of way for 100 feet and that she did look other than at the crossbuck sign. Mrs. McFarlin testified: (R. 43)

> Q. How far did the weeds extend out from the track, from the north rail of that single track to where they would obscure your view? A. They were back the full distance of the right of way. (R. 27) A. I didn't say I hadn't looked any of that distance up to the 15 foot, but I had glanced through there and couldn't see.
>
> (R. 45) Q. I know you tried when you were parked, but when you left the position you were parked in, then you didn't look any more until the time when you looked up and saw the train coming? A. Oh, yes, I did too. I was looking all the time.

Petitioners contend that the courts conclusion that "the train was in full view" is contrary to the testimony of each and every witness called by the plaintiffs or the defendant. All witnesses having knowledge as to this issue testified the weeds obscured the vision, particularly to the west. The fireman of the train, who was in the cab and therefore higher than the weeds saw only the top of the car. The engineer could not see the car until it emerged from the weeds just short of the track. The special investigator of the defendant testified the weeds would obscure a motorists vision. A posed photo was admitted which was taken two years later in March, with the weeds burned to the ground, which partially showed the train.

The court said "a witness who was following Mrs. McFarlin at a distance of about 25 feet, testified that he saw the train approaching from the west . . ." but this witness, Henry Pilley had previously said he was on the shoulder of the highway. This was a distance of 190 feet. Also the shoulder was five feet higher than the crossing.

> (R. 59) A. She stopped right up almost on the tracks there.
>
> Q. Now, at that time were you still on the shoulder of the highway? A. Yes, I was.
>
> (R. 68) Q. You could see the train very plainly, could you? A. No, not too plainly. You have weeds back here, also a fill along here.

Even counsel for the defendant in making his motion to dismiss prior to closing his case admitted there was a conflict in the evidence as to the care exercised by Mrs. McFarlin, although he did minimize his admission. (R. 146)

The jury, of course, could have accepted or rejected testimony of witnesses. The appellate court, however, under well established principles of judicial review on a question of judgment *n.o.v.* was required to take the view of the evidence, and inferences therefrom, most favorable to the verdict and the party for whom it was rendered and on motion for directed verdict must disregard all unfavorable testimony and inferences. *Landers* v. *Atchison, T. & S.F. Ry. Co., supra.*

Equally as well established is the principle of law that the Court of Appeals may not substitute its judgment for that of the triers of fact, nor reweigh the evidence or set aside a verdict merely because the jury might have drawn different inferences or conclusions. *Sentilles* v. *Inter-Caribbean Corp.*, 361 U.S. 107.

The Appeal Court has therefore departed from the accepted and usual course of judicial review so as to require the supervision of this court. Certiorari should be granted so this Court may review the Circuit Courts application, or misapplication, of these well accepted and established principles.

4. The Circuit Court's decision curtails and denies to the petitioners their right to trial by jury under the Seventh Amendment of the Constitution of the United States.

This action should be carefully scrutinized, not only because of the importance to these petitioners, but because of the highest importance to all American citizens, to secure the preservation of this essential and fundamental guaranty of civil liberty.

Blackstone (Commentaries On The Law, 1941) considered trial by jury as the bulwark of liberty and said it was looked upon as the glory of the English law. He advised:

> It is the duty of every man to maintain this valuable constitution in all its rights, to restore it to its ancient dignity, if at all impaired; to amend it, wherever defective; and above all to guard jealously against the introduction of new and arbitrary methods of trial, which under plausible pretences, may imperceptibly undermine this best preservative of English liberty.

Justice Black has pointed out that the directed verdict was invented in 1850 and traces the history of jury supremacy to jury subordination in *Galloway* v. *United States*, 319 U.S. 54, and says that this constriction of a constitutional right should not be continued. In numerous cases since then this Court has granted certiorari to protect this fundamental right. *Gibson* v. *Phillips Petroleum Co.*, 352 U.S. 874; *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437.

Certiorari should be granted to correct the erosion of this fundamental right and to insure respect of the jury function in passing on disputed questions of fact and inferences to be drawn therefrom.

5. The respondent waived any right to ask for judgment *n.o.v.* after verdict was rendered by failure to move for a directed verdict at the close of the respondent's case and at the close of the whole case. Petitioners state that the record was not clear on this assertion but petitioners moved, under rule 75 (h), in the circuit court that the record be corrected to include omitted rebuttal testimony. The motion was not ruled on but the opinion states, "the motion for directed verdict was renewed at the close of all the evidence."

> The unanimous interpretation of Federal rule 50 (6), 28 USCA, from which New Mexico's rule of the same number was taken verbatim is that the motion for a directed verdict at the close of all of the evidence is a prerequisite to a motion for judgment notwithstanding the verdict. *Bondanza* v. *Matteucci*, 59 N.M. 354, 284 P.2d 1024.

The petitioners attempted to have the record supplemented to clearly show that motion for directed verdict was not made after the close of the petitioners rebuttal evidence, and that in no case was the respondent entitled to a judgment notwithstanding the verdict. Although the matter was argued on oral argument the Court of Appeals made no express ruling thereon. However, petitioners assert that it was the obligation of the respondent, not of the petitioners, to have everything in the record that was essential to support their claim for judgment n.o.v. *King* v. *Carmichael*, 268 F.2d 305. The question of the sufficiency of the evidence to support the verdict is not subject to review unless the record shows the motion for directed verdict. The record does not show such a motion after the defense rested its case. (R. 146) From

this point the record skips from page 336 of the reporters transcript to page 359 at which point the jury returned its verdict. This deletion was the portion of the transcript that petitioners attempted to have supplemented. No other motion is reflected until after the verdict of the jury was returned. On motion after the verdict counsel for petitioners pointed out that motion for directed verdict was not made at the close of all the evidence and counsel for respondent replied that he made a motion at the close of our (referring to respondent) case, but he did not so assert as to petitioners case. (R. 147)

The Circuit Court should have supplemented the record to clarify this issue so that proper legal ruling could have been made. Certiorari should be granted thereon.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7650—JULY TERM—1964

CHICAGO, ROCK ISLAND and PACIFIC RAILROAD COMPANY, a corporation, Appellant, Vs. CLAUDINE MCFARLIN and LEONARD MCFARLIN, Appellees.	Appeal From The United States District Court For The District Of New Mexico.

(Filed August 28, 1964)

Robert J. Seller and Jack Whorton of the Firm of Shipley, Seller & Whorton, Alamogordo, New Mexico, for Appellant.

Emmett Hart of the Firm of Hart and Brockman, Tucumcari, New Mexico, for Appellees.

Before MURRAH, Chief Judge, and PICKETT and HILL, Circuit Judges.

PICKETT, Circuit Judge

This is a railroad crossing accident case brought by Claudine McFarlin and her husband, Leonard, to recover damages for injuries sustained by Mrs. McFarlin resulting from a collision between an automobile which she was driving, and a Chicago, Rock Island and Pacific Railroad train. The railroad appeals from a judgment in favor of the McFarlins. The determinative question is whether, under New Mexico law, Mrs. McFarlin was guilty of contributory negligence which would bar recovery for her injuries. It is our view that Mrs. McFarlin was guilty of contributory negligence as a matter of law, and that the trial court should have directed a verdict for the railroad.[1]

In an unbroken line of decisions, the New Mexico Supreme Court has established a course of conduct for a traveler approaching an open, unguarded railroad crossing which requires him to stop, look and listen for trains using the tracks, and the act of looking and listening must be performed in such manner as to make it reasonable effective. Morehead v. Atchison, T. & S.F. Ry. Co., 27 N.M. 349, 201 P. 1048; Sandoval v. Atchison, T. & S.F. Ry. Co., 30 N.M. 343 233 P. 840; Blewett v. Barnes, 62 N.M. 300, 309 P. 2d 976; Landers v. Atchison, T. & S.F. Ry. Co., 68 N.M. 130, 359 P.2d 522.[2] "Ordinarily, a showing of all three factors is essential to establish due

[1] At the close of plaintiff's evidence, the defendant moved for a directed verdict, one of the grounds for the motion being that Mrs. McFarlin was guilty of contributory negligence. This motion was overruled but renewed at the close of all the evidence. The question was also raised on motion for judgment notwithstanding the verdict.

[2] In Landers v. Atchison, T. & S.F. Ry. Co., 359 P.2d 522, it is pointed out that the degree of care to be exercised by a traveler approaching a guarded railroad crossing where signals and warning devices have been installed is different than when approaching an open, unguarded railroad crossing. Morehead v. Atchison, T. & S.F. Ry. Co., 27 N.M. 349, 201 P. 1048. See also Landers v. Atchison, T. & S.F. Ry. Co., 73 N.M. 131, 386 P.2d 46.

care." Blewett v. Barnes, supra, at 979. The New Mexico courts have approved what is commonly known as the "Pennsylvania Rule", announced in Baltimore & Ohio R.R. Co. v. Goodman, 275 U.S. 66, 56 A.L.R. 645.

In Atchison, T. & S.F. Ry. Co. v. Herbold, 169 F.2d 12, 14-15, this court said:

> "Under the law of New Mexico, a traveler on a highway approaching a railroad crossing is under the continuous duty to effectively look and listen and observe ordinary care for his own safety. Morehead v. Atchison, T. & S.F. Ry. Co., 27 N.M. 349, 201 P. 1048, 1049.
> * * *
> If he approached the crossing known to him and failed to look from an effective point, he was likewise guilty of contributory negligence as a matter of law. Morehead v. Atchison, T. & S.F. Ry. Co., supra; Brim v. Atchison, T. & S.F. Ry. Co., 136 Kan. 159, 12 P.2d 715, 717."

See also Atchison, T. & S.F. Ry. Co. v. Spencer, 9 Cir., 20 F. 2d 714, applying New Mexico law.

The McFarlins lived about 3½ miles east of the city of Tucumcari, Quay County, New Mexico, on the south side of the main line of the Chicago, Rock Island & Pacific Railroad tracks. In traveling to and from Tucumcari it was necessary for them to cross the track at a point about three miles east of the city. On July 12, 1960, Mrs. McFarlin drove her 1950 Chevrolet automobile into town and was returning home at about 10 A.M. Before reaching the crossing she traveled along the main highway on the north side of the tracks. The road to the McFarlin home left the highway about 190 feet north of the railroad crossing. Upon reaching the turnoff Mrs. McFarlin took her mail from the box located there and then proceeded south toward the tracks. There was a conventional railroad crossing sign about 15 feet north

of the tracks. Mrs. McFarlin testified that she did not look for an approaching train until she stopped her automobile near this sign, but from this point she was unable to see a train approaching from the west because of the high growth of weeds. She stated that the west window of her automobile was closed and she did not hear the train although the evidence is undisputed that the engine whistle was blown and its bell was ringing as she drove from the mail boxes to the crossing. After this stop she proceeded slowly toward the crossing but was unable to see to the west until the front end of her automobile reached a point where she knew it could be hit by an oncoming train. She then saw a train approaching from the west about 200 to 300 feet away, and for the first time heard a whistle. She stopped the car, and in attempting to back off the tracks, stalled the motor, and the front of her car was struck by the oncoming train which was moving at a very slow rate of speed. A witness who was following Mrs. McFarlin at a distance of about 25 feet, testified that he saw the train approaching from the west and heard the whistle blown, but was uncertain as to whether he heard the engine bell ringing.

Mrs. McFarlin had used this crossing on an average of three times daily for a period of 5½ years. She testified that she had crossed the tracks at that point from 3,000 to 4,000 times. She knew that it was the main line of the railroad and that trains passed there frequently. It was indicated by the testimony and the photographs that the weeds complained of extended only a short distance north of the railroad crossing sign. After she left the main highway, the train was in full view, but she made no attempt to look to the west until she stopped at the point where the weeds obstructed her view. If Mrs. McFarlin was unable to see the train at that time, it was because she had elected to look from the only place where it could not be seen. In addition, her ability

to hear the train was impaired by the closed car window. Under New Mexico law, she was required to stop her car at a point where, if she looked to the west, it would be effective, and to listen under circumstances which would permit her to hear that which was audible. She could not shut the view from her eyes or the sound from her ears and be relieved of her duty.[3]

REVERSED and REMANDED with instructions to enter judgment for the appellant.

---

[3] We find no New Mexico decisions which indicate a departure from the rule of Morehead v. Atchison, T. & S.F. Ry. Co., 27 N.M. 349, 201 P. 1048. The case was referred to as being the law in New Mexico in open crossing cases as late as 1963. Landers v. Atchison, T. & S.F. Ry. Co., 73 N.M. 131, 386 P.2d 46.

APPENDIX B

Judgment

Thirty-Fifth Day, July Term, Friday, August 28th, 1964.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett, and Honorable Delmas C. Hill, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of New Mexico and was argued by Counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court with instructions to enter judgment for the appellant, and that Chicago, Rock Island and Pacific Railroad Company, a corporation, appellant, have and recover of and from Claudine McFarlin and Leonard McFarlin, appellees, its costs herein and have execution therefor.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 721

CLAUDINE McFARLIN and LEONARD McFARLIN,
Petitioners,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Respondent.*

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S ADDITIONS TO THE STATEMENT OF THE CASE TO CORRECT OMISSIONS

Petitioners' statement of the case is supplemented by the following matter to correct omissions of fact.

On July 14, 1960 and for five or six years prior to that time, Mrs. McFarlin had been employed as a bus driver for the Tucumcari Public Schools during the school term and in the summer months she drove a

bus in connection with the summer recreation program in Tucumcari. (R. 17, 22-23) She had crossed the railroad tracks at this crossing three or four thousand times in the school bus, and on quite a number of occasions in her automobile. (R. 22-23)

On the day of the accident, when Mrs. McFarlin got out of her car some 190 feet from the tracks to get her mail, she did not look in the direction of Tucumcari, that is toward any approaching train, because she was going to get her mail and saw no reason for looking from that vantage point. (R. 22-23)

As she drove towards the tracks, the window on the driver's side was down but the window on the right, or the side facing Tucumcari and the approaching train, was up and closed. She stated that she saw no reason that day for having both windows down. She admitted that if both windows were down she might hear better. (R. 23-24)

It is clear that Mrs. McFarlin did not stop her car or look from any point after she left the mail boxes where she was able to see the train until she first stopped some fifteen feet from the crossing, although she did glance in the direction from which the train was coming. (R. 17-18, 26-27, 70-72, 140) The train as it approached had its headlight on and the bell on the engine was ringing and had been ringing the entire time since it left the yard at Tucumcari. (R. 90) At approximately 700 feet from the crossing, the engineer Jones started a sequence of whistles because the train was approaching the crossing. (R. 87) At approximately 400 feet, Engineer Jones began blowing the second sequence of crossing whistles and at about this time Brakeman Farris in-

formed Engineer Jones[1] that Mrs. McFarlin's car was nearing the crossing. (R. 87) Jones continued to blow the whistle. Mrs. McFarlin, not hearing the whistle, (R. 19) proceeded down the roadway, stopping at 15 feet from the crossing, at least momentarily, (R. 15, 65, 140) and then drove onto the crossing. She stated that she had never before proceeded past this point without first ascertaining if a train was there. (R. 28, 29)

Without assigning error, petitioners complain of certain "rebuttal evidence" which they say was omitted from the record despite their motion to supplement the record in the Court of Appeals.

To avoid misunderstanding as to the nature of this testimony, Respondent has filed as its Appendix I a transcript of this "rebuttal evidence" under the certificate of the reporter of the District Court.

RESPONSE TO PETITIONERS' REASONS FOR GRANTING THE WRIT

The Respondent will respond to Petitioners' points 1, 2 and 3 together since they involve the same question. Petitioners' point 4 urges that the decision of the Circuit Court of Appeals denied Petitioners their right to trial by jury under the Seventh Amendment to the Constitution of the United States and deprives them of their civil liberty and that the Circuit Court of Appeals so departed from established

---

[1] In the case of *Sandoval* v. *Atchison, T. & S.F. Ry. Co.*, 30 N.M. 343, Defendant had proved without contradiction that warning signals were given both by whistle and bell. Plaintiff testified that they were not heard by him. The curtains on his car were in place. The Supreme Court (New Mexico) said: "Under such circumstances the evidence is that the signals were given and there is no evidence to the contrary."

practice as to require the supervision of the Supreme Court of the United States. This will not be responded to at all by this Respondent except to say the following:

4. It is established law that a complaint may be dismissed, or a judgment on the pleadings entered, or a summary judgment granted, or a directed verdict ordered, or a judgment notwithstanding verdict entered under the proper circumstances. Although the stage of the proceedings in each of the instances of judicial intervention is progressively different, nonetheless each can have the effect of depriving the party of a jury trial. The justification for this intervention in each instance is basically the same. Under the law, the party is not entitled to a trial (by jury or otherwise) because he cannot produce or has not produced facts sufficient by any fair and reasonable view which would entitle him to the relief he seeks. Consequently, this question presented by the Petitioners as to their "civil liberty" is controlled by the answer they seek in the first three questions presented by them. Taking the questions presented in reverse order:

3. We will concede Petitioners' point 3: "A Circuit Court cannot re-examine and weigh conflicting facts and substitute its findings of fact or the inference therefrom contrary to the verdict of the jury."

Here Petitioners and Respondent are in agreement. However, the Tenth Circuit Court of Appeals did not do that in this case as will be shown by Respondent's answer to question 1.

2. Petitioners present as their second question: "Whether what is 'reasonably' effective care in

stopping, looking and listening in approaching a railroad crossing is a question of fact or of law."

The question here presented is not a clear one since it must be answered: "It is either a question of fact or of law, or both, depending upon the case."

The second and third questions presented by the Petitioners appear to Respondent to be nothing more than particularized and partial restatements of the first question presented by Respondent. We will therefore direct our attention to the first question and by so doing undertake to answer all three.

1. Petitioners complain in the first question presented by them as follows: "Whether the decision of the Circuit Court of Appeals conflicts with New Mexico law as to the duty of care to be exercised by a motorist in approaching a railroad crossing, in a case where the motorist has stopped, looked and listened."

The first appeal heard by the New Mexico Supreme Court involving a railroad crossing accident was in 1921. The case was *Morehead* v. *Atchison, T. & S. F. Ry. Co.,* (1921) 27 N.M. 349, 201 P. 1048. It has been the law in this state since that time. *Sandoval* v. *Atchison, T. & S. F. Ry. Co.,* (1925) 30 N.M. 343, 233 P. 840; *Blewett* v. *Barnes,* (1957) 62 N.M. 300, 309 P. 2d 976; *Landers* v. *Atchison, T. & S. F. Ry. Co.,* (1961) 68 N.M. 130, 359 P. 2d 522; and *Landers* v. *Atchison, T. & S. F. Ry. Co.,* (1963) 73 N.M. 131, 386 P. 2d 46.

The Tenth Circuit Court of Appeals has considered railroad crossing law in New Mexico in several appeals since the rule was enunciated by the Court in the *Morehead case* (*supra*). These opinions have consistently followed the lead of the New Mexico Supreme

Court. This is as it should be. *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 82 L. Ed. 1188. They are: *Atchison, T. & S. F. Ry. Co.* v. *Spencer,* (1927) 20 F. 2d 217; *Atchison, T. & S. F. Ry. Co.* v. *Herbold,* (1948) 169 F. 2d 12; *Lester* v. *Atchison, T. & S. F. Ry. Co.,* (1960) 275 F. 2d 242, and the instant case. There can be no doubt from an examination of these cases that the law as to unguarded country crossings remains as it was announced in the *Morehead case* forty-three years ago. The Court in that case said:

> " 'The law requires of one going into so dangerous a place the vigilant exercise of his faculties of sight and hearing at such short distance therefrom as will be effectual for its protection, and if this duty is neglected, and injury results, there can be no recovery, although the injury would not have occurred but for the negligence of others. Continental Improvement Co. v. Stead, 95 U.S. 161, 24 L. Ed. 403; Railroad Co. v. Houston, 95 U.S. 697, 24 L. Ed. 542; Schofield v. Chicago, M. & St. P. R. Co., 114 U.S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; Northern Pacific R. R. Co. v. Freeman, 174 U.S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; Chicago, etc., Ry. Co. v. Andrews, 64 C.C.A. 399, 130 Fed. 65; Shatte v. Erie R. R. Co., 59 C.C.A. 1, 121 Fed. 678; Ames v. Waterloo, etc., Co., 120 Iowa 640, 95 N.W. 161.' Chicago Great Western Ry. Co. v. Smith, 141 Fed. 930, at page 931, 73 C.C.A. 164."

> " 'The duty to look and listen requires the traveler to exercise care to select a position from which an effective observation can be made. The mere fact of looking and listening is not always a performance of the duty incumbent upon the traveler, for he must also exercise care to make the act of looking and listening reasonably effective.'—and cases cited. Elliott on Railroads, vol. 3, par. 1166."

"'The doctrine has been repeatedly stated by this court that a traveler approaching a railroad crossing must take notice of the fact that it is a place of danger, and must not only look and listen for the approach of trains before he goes upon the track, but must continue to look and listen until he has passed the point of danger. He must continue his vigilance until the danger is passed, and must look both ways up and down the track.' Choctaw, O. & G. R. Co. v. Baskins, 78 Ark. 355, 358, 93 S.W. 757, 758, and cases cited."

"'One need not be vigilant at extravagantly long range. This would be futile, and precaution might exhaust itself before peril came. Nor does the law expect incessant observation, or exact the performance of the impossible feat of looking both ways at once. But it is plain that care, in order to be effective, must cover the whole field of danger. If risk is inherent in a continuing state of things, the duty to exercise reasonable care is to the same extent a continuing obligation.' Winter v. New York & L. G. R. Co., 66 N.J. Law 677, 50 Atl. 339."

In the *Spencer case* (*supra*) in 1927, the Tenth Circuit Court of Appeals cited the *Morehead case* as authority at point 1, commencing on page 716 of the Report, stating the general duty to "Stop, Look, and Listen" in the following language:

"(1) As pertinent to the undisputed facts, the well-established rule is that one who is about to drive a motorcar or truck over a railroad track at an unguarded crossing always has the obligation upon him vigilantly to use his faculties of sight and hearing. The driver must look to see whether a train is approaching. If, for any reason, his view of the track is obstructed, his duty is to listen. If, perchance, the engine of his automobile is making any noise, or if there is

> noise or confusion due to any cause which interferes with his hearing; it is his duty to take the precaution of stopping and listening. If the track is a single one, he should be vigilant to look in both directions before attempting to cross."

In the *Sandoval case* (*supra*) the Supreme Court of New Mexico approved the *Morehead case* on page 346, at point 3:

> "(3) Plaintiff relies upon the alleged negligent maintenance of an embankment upon defendant's right of way, obscuring the view of travelers approaching the crossing. There is some evidence to the effect that at the turn, 100 feet from the crossing, there is an embankment which might obscure the view of the track, but the evidence is uncontradicted that from a point 33 feet from the crossing, all the way up to the crossing, there is nothing to obscure the view of an approaching train by any one who is willing to look. The plaintiff, in traveling this 33 feet, never looked up the track to see if there was an approaching train until he was within 10 feet of the crossing, when one of his companions called out that the train was approaching, whereupon he applied the brakes to stop his automobile, but failed to stop in time. This was gross negligence on the part of the plaintiff, and prevents a recovery. It is a worse case than Morehead v. A., T. & S. F. Ry. Co., 27 N.M. 349, 201 P. 1048, where it was held no recovery could be had."

In 1934, in the case of *Russell* v. *Davis,* 38 N.M. 533, 37 P. 2d 536, the Supreme Court of New Mexico for the first time made reference to what Petitioners have referred to as the "Pennsylvania rule". In this case, the New Mexico Supreme Court quoted from *Baltimore & Ohio RR Co.* v. *Goodman,* (1927) 275 U.S. 66,

48 S. Ct. 24, 72 L. Ed. 167, 56 A.L.R. 645, where it was said:

> "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk."

The facts in the case before the Supreme Court in the *Russell case* (*supra*) involved a pedestrian, however, and not a train. The Supreme Court of New Mexico in approving the "Pennsylvania rule" and the *Goodman case* had this to say at page 537 of the New Mexico Reports:

> "The rule in the Goodman case, supra, as applied to a man who goes upon a railroad track is sound. 'He knows that he must stop for the train not the train stop for him.' The train is tied in its course of travel to the tracks from which it does not deviate. It does not go careening all over the right of way. That is not true of the automobile. Its path is not fixed to two strands of steel. If the brakes of the car are in good order, it can stop within a reasonable distance. It can turn to the right or left at the command of the steering wheel. Railroad tracks are the exclusive course of the railroad train. In New Mexico the main highways are not exclusively reserved for motorists. The pedestrian can be seen trudging along or across the highway to his destination

> without deeming himself a trespasser. The narrow-wheeled wagons of the mountaineer drawn by pinto ponies vie with the lowly burros loaded with their burden of firewood for a place on the macadam or concrete. For all of these the motorist must and often does turn aside or stop to avoid collision."

This was the first mention of the so-called "Pennsylvania rule" in Nex Mexico. It was in 1934.

In 1948, the Tenth Circuit Court of Appeals again had an occasion to look at New Mexico railroad crossing laws in the case of *Atchison, T. & S. F. Ry. Co.* v. *Herbold,* 169 F. 2d 12. It followed the *Morehead case* (*supra*). On page 14, at points 2, 3 and 4, the Court stated:

> "(2) Under the law of New Mexico, a traveler on a highway approaching a railroad crossing is under the continuous duty to effectively look and listen and observe ordinary care for his own safety. Morehead v. Atchison, T. & S. F. Ry. Co., 27 N.M. 349, 201 P. 1048, 1049.
>
> "(3) Here, the crossing was open and unobstructed. If Herbold looked, he must have seen the approaching train and undertook to pass over the crossing ahead of it. So to do would constitute contributory negligence as a matter of law.
>
> "(4) If he approached the crossing known to him and failed to look from an effective point, he was likewise guilty of contributory negligence as a matter of law. Morehead v. Atchison, T. & S. F. Ry. Co., supra; Brim v. Atchison, T. & S. F. Ry. Co., 136 Kan. 159, 12 P. 2d 715, 717."

In 1957, the Supreme Court of New Mexico approved the *Morehead case* (*supra*) and at the same time approved the reasoning of the Supreme Court in the

Goodman case, and the application of the Pennsylvania rule. *Blewett* v. *Barnes*, 62 N.M. 300, 309 P. 2d 976. The Court held at point 2, page 304 of the New Mexico Reports:

> "(2) To summarize the evidence, he failed to stop, look and listen. Instead, he drove blindly upon the crossing, over the first, the second and even the third track, and into the path of an oncoming train on the fourth track before being stopped by it. This convicted him of contributory negligence, as a matter of law. The Baltimore & O. Ry. Co. v. Goodman, 275 U.S. 66, 48 S. Ct. 24, 72 L. Ed. 167; Morehead v. Atchison, T. & S. F. Ry. Co., 27 N.M. 349, 201 P. 1048; Sandoval v. Atchison, T. & S. F. Ry. Co., 30 N.M. 343, 233 P. 840. Even, if it could be said the evidence would support a finding that plaintiff 'listened,' negative as such testimony is, the testimony is undisputed that he did not stop, nor did he look. Ordinarily, a showing of all three factors is essential to establish due care."

In *Landers* v. *Atchison, T. & S. F. Ry. Co.*, (1961) 68 N.M. 130, the Supreme Court of New Mexico distinguished the law controlling a guarded crossing from the law controlling an unguarded country crossing. The Court nonetheless approved the rule commonly called the "Pennsylvania rule" as stated in the *Goodman case* by the United States Supreme Court as to open crossings.

Two years later, in 1963, the distinction made by the Court in the *Landers case* (*supra*) was approved by the Court on an appeal of a retrial of the same case. It is reported in 73 N.M. 131, 386 P. 2d 46. Again, it approved the *Morehead case* as ruling law at unguarded open crossings.

The *Lester case* (*supra*) decided in 1961 by the Circuit Court of Appeals, does not enter into the question involved here. It was concerned not with contributory negligence as such but with the question of whether contributory negligence could be a jury question in a case where gross, wanton, or wilful negligence was pleaded and proved. The Court held that it could not be under New Mexico law; therefore the *Morehead case* was not discussed.

Four decades ago, the New Mexico Supreme Court laid down the rule in the *Morehead case* which it has said is the "Pennsylvania rule." During the time since then it has been constant in its application of this rule to unguarded country crossings marked only with a crossbuck. The Tenth Circuit Court of Appeals has been faithful in applying the State law in such cases. There has been no conflict. There has been harmony. In the Petitioners' case, the Circuit Court cited only New Mexico cases or earlier Circuit Court cases applying New Mexico law.

That Court concluded in its opinion (Appendix B, Page 22 of Petitioners' Brief):

> "Under New Mexico law, she was required to stop her car at a point where, if she looked to the west, it would be effective, and to listen under circumstances which would permit her to hear what was audible. She could not shut the view from her eyes or the sound from her ears and be relieved of her duty."

The Circuit Court added there were no cases that would indicate a departure from the *Morehead case;* to the contrary, it was referred to as the law of the State as late as 1963 (ibid. f.n. 3).

Consequently, the body of law of the State of New Mexico is not threatened in any way by the opinion of the Circuit Court of Appeals.

Pokora v. *Wabash R. Co.*, 292 U.S. 98, 78 L.Ed. 1149, had no limiting effect on the *Morehead case*. Petitioners cannot hope to argue this. It is the prerogative of the New Mexico courts to approve the "Pennsylvania rule" as expressed in the *Goodman case*. Petitioners cite *Erie R. Co.* v. *Tompkins* (*supra*) for the proposition that State law is controlling on non-federal questions. They are right. The "Pennsylvania rule" (an expression of which is in the *Goodman case*) was adopted in the *Morehead case* (which is also an expression of that rule) and the *Morehead case* is the law in New Mexico.

Respondent submits that Petitioners are disturbed over *Goodman* because they have not fully understood the point that in crossing cases we are concerned with rules of conduct in determining due care and not due care as it is defined ordinarily.

Justice Holmes did not lay down once and for all in the *Goodman case* that a man must always approach a crossing on foot. He merely made an application or gave an example of what a reasonable man would do to make an effective use of his senses under the circumstances of that case before he drove his car into the path of a locomotive. Mrs. McFarlin in this case had the alternatives of stopping and looking from one of the other vantage point at the scene of the accident or of listening for the bell or whistle, or the sound of the train itself. One of these acts would have made the facts apparent to her. The evidence demonstrated that a careful and effective use of her senses would

have made her aware of the presence of the train and she could have avoided injury to herself.

The Petitioners mention the case of *Padilla* v. *Railroad Co.,* 16 N.M. 576, 120 P. 724. They cite this as authority for two propositions. (1) A decedent has the benefit of a presumption that he was exercising due care in the casualty connected with his death (he stopped, looked and listened), and (2) this presumption has the force of evidence. However, this case cannot be helpful to Petitioners. As to point (1), Mrs. McFarlin was not killed. Consequently, such a presumption cannot apply since she can establish what her actions were by testifying in her own behalf. As to point (2), the presumption does not have the force of evidence; it disappears when any reasonable evidence to the contrary is introduced. *Hartford Ins. Co.* v. *Horne,* 67 N.M. 440, 38 P.2d 1062. In fact, in 1959, the New Mexico Court in this case overruled *Padilla,* expressly, insofar as *Padilla* stood for the proposition that the presumption amounts to evidence. *Padilla* can afford the Petitioners no comfort as a buttress to this case.

5. Next Respondent turns to the fifth question presented by Petitioners: "Whether respondent waived right to ask for judgment notwithstanding the verdict by not moving for a directed verdict at the close of all the evidence."

The substance of this omitted testimony is incorporated in Respondent's Appendix I to this brief.

Petitioners cite no authority for their position except for the literal construction that they would have the Court place on Rule 50. Perhaps the Supreme Court will indulge counsel in remarking that a trial

court is a very different kind of place. During a trial such as this one, counsel for a litigant is trying to keep the jury's interest and compel their minds to a conclusion; and at the same time to preserve the record and keep the trial court correct in its view of the law; but despite these ends, he must try to preserve the amenities between the trial judge and himself and opposing counsel and himself to the extent that the fair representation of his client will allow and require.

Picture then the situation disclosed by the transcript filed as an Appendix. The jury is still sitting, waiting to hear argument and to be instructed. Respondent having concluded its evidence and before closing its case wants to renew its motion for a directed verdict because of its contention that the railroad was not negligent and that the Petitioners were contributorily negligent. There had been a long argument on these points at the close of Petitioners' case. (R. 115-127)

The Court, because of the previous motion, knew as did counsel for the Petitioners just what the Respondent was going to say. The Court interrupted counsel for the Respondent when the direction in which he was going was clear, informing Respondent in effect that the Court understood, that it understood why it was being made at the close of the evidence, but that the case was going to the jury. (Appendix I)

The Court then asked counsel about an instruction the Court was to give the jury on the mortality table. Its motion for a directed verdict overruled, the defense rested.

Then the Petitioners offered their so-called "rebuttal evidence". The evidence inquired into two things, neither material. One, whether a claim agent for the railroad knew of the injury the day it happened. This

evidence rebutted nothing, nor did it involve an issue in the lawsuit. Two, the evidence showed that Mrs. McFarlin complained of pain to the agent on the evening of the accident. This testimony rebutted nothing; nor did it serve any other purpose.

All of the medical testimony and all of the record as it related to pain and suffering was eliminated from the Respondent's record on appeal to the Tenth Circuit Court of Appeals under Rule 75(e), Rules of Civil Procedure, which requires that matters not essential to the appeal be eliminated from the record.[2]

Counsel will state, however, that the fact that Mrs. McFarlin suffered from her injuries was never put into issue.

Consequently, the evidence served no purpose. It was not material to any of the issues. Respondent made no objection because of its brevity and the fact that its presence in the record, though improper rebuttal, was harmless.

Thereafter, the Court immediately proceeded to its business with the jury and stated that the case was now ready for jury argument and the Court's instructions. (Appendix I)

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[2] Rule 75 (e)

Record to be abbreviated. All matter not essential to the decision of the questions presented by the appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document shall be excluded. Documents shall be abridged by omitting all irrelevant and formal portions thereof. For any infraction of this rule or for unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties.

Counsel for the Respondent, if he had assumed out of an abundance of caution that the Court should adjourn to chambers where it had been only moments before so that he could present the same motion he had just presented, would have been considered impertinent by the Court. The Court had just told Respondent that although Petitioners' case was weak, it would be given to the jury. (Appendix I) Nothing had changed, nothing materially had happened.

Petitioners are not asking for a fair and reasonable application of Rule 50; nor are they seeking to take advantage of a careless but substantial oversight on Respondent's part. Petitioners seek a windfall, where no harm was suffered and no surprise given them; nor was the Court misled.

SUMMATION

Respondent submits that no special or important reasons have been advanced by Petitioners in support of their application that would compel the Court to the conclusion that the writ should be granted in the exercise of its sound discretion.

Respondent respectfully moves the Court that Petitioners' application for writ of certiorari to the United States Court of Appeals, Tenth Circuit, be denied.

Respectfully submitted,

WILLIAM R. FEDERICI
Counsel of Record
for Respondent

J. T. WHORTON
ROBERT J. SELLER
GEORGE A. SHIPLEY
Counsel for Respondent

APPENDIX I

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. 4934

Civil

CLAUDINE McFARLIN and LEONARD McFARLIN, *Plaintiffs*,

v.

CHICAGO, ROCK ISLAND & PACIFIC RAIROAD CO.,
a corporation, *Defendant*.

Partial Transcript of Proceedings

November 6 and 7, 1963

APPEARANCES

For the Plaintiffs:

Messrs. Hart and Brockman
Attorneys at Law
117 West Aber
Tucumcari, New Mexico

For the Defendant:

Messrs. Shipley, Whorton and Seller,
Attorneys at Law
Post Office Box 751
Alamogordo, New Mexico

BE IT REMEMBERED, that on the 4th, 5th, 6th, and 7th days of November, 1963, the above entitled and numbered cause came on for trial before the Honorable H. Vearle Payne, United States District Judge, and a jury at Albuquerque, New Mexico, and that proceedings were had, in part, on the 6th and 7th days of November as follows:

PARTIAL TRANSCRIPT OF PROCEEDINGS

(The following proceedings were had in the Court's chambers, outside the presence of the jury, counsel for the parties being present:)

Mr. Whorton: If it please the Court, the defendant at this time will renew its motion to dismiss the first cause of action, the defendant having closed its evidence, on the ground that the plaintiff was contributorily negligent as a matter of law.

I feel that the defendant's case as it has come forward has clearly demonstrated that the plaintiff used no care whatsoever in approaching this crossing, that she appeared to be totally preoccupied and, after leaving the mailboxes, simply drove upon the crossing and was struck. I realize there is a slight conflict in evidence there, but it is so small and insignificant, in defendant's mind, that we are moving for—

The Court: I will overrule the motion. You understand that I realize it is a weak situation, but I just feel some doubt in my own mind and feel that, feeling some doubt, I should submit it to the jury.

Can you agree on that mortality table so I can tell the jury?

Mr. Seller: 27.75.

(The conference in chambers was concluded and the following proceedings were had in the presence of the jury:)

The Court: Does the defense rest?

Mr. Seller: The defense rests.

The Court: You may read your stipulation into the record, Mr. Hart.

Mr. Hart: If the Court please, it is stipulated by and between counsel that the record may show the average morality of a person 43 years of age to be—that is, the average life expectancy remaining to be 27.75 years.

The Court: All right, the record will so show.
Mr. Seller: It is so stipulated.
The Court: You may call your rebuttal witnesses.
Mr. Hart: Mr. Clinger.

N. W. CLINGER

having previously been sworn, further testified as follows:

Direct Examination

By Mr. Hart:

Q. You are the same Mr. Clinger that previously testified, is that correct? A. Yes, sir.

Q. Mr. Clinger, did you go to the home of the McFarlins on the evening of July 12, 1960? A. Yes, sir.

Q. And did Mrs. McFarlin tell you at that time of any injury that she had received in the collision? A. I believe she complained of her neck, as I recall it.

Q. At that time? A. Yes, sir.

Mr. Hart: That is all, your Honor.

The Court: Any cross?

Mr. Seller: No cross, your Honor.

The Court: You may step down.

Mr. Hart: That is all the plaintiff's rebuttal, your Honor.

The Court: Now, ladies and gentlemen of the jury, this is all the evidence to be given in this case. The Court is going to have to prepare instructions to the jury, and, after they are prepared, we will then hear the arguments on each side and then I will read the instructions. I wondered, ladies and gentlemen, if I were to excuse the jury now or recess now so that counsel and the Court can work on the instructions this evening, if you would have any objection to starting work at eight o'clock in the morning. Would that bother any of you? I have other cases and I would like to get started so that I can get the other cases going. I think then that we will recess now and I will work on instructions and, Mr. Farlow, your case

won't start until I can hear the arguments of counsel and give the instructions in the morning, but we will start at eight so as to get to you as soon as we can. I would anticipate, in any event, we can get started with the next trial by ten and maybe a little before ten.

Now, ladies and gentlemen, I will repeat the cautions I previously made about discussing the case or reading about it, making up your minds about it until you have heard the arguments of counsel and the instructions of the Court. Subject to those admonitions, Court will stand in recess until eight o'clock in the morning.

(Whereupon, Court recessed at 3:45 p.m. on November 6, 1963, until 8:10 a.m. on November 7, 1963, at which time the following proceedings were had:

The Court: Gentlemen, do you want your arguments taken by the reporter or not?

Mr. Hart: I don't believe so, your Honor.

Mr. Seller: We won't request it, your Honor.

The Court: Let the record show that both sides have waived the taking of the argument.

(Whereupon, arguments were presented to the jury by Mr. Hart on behalf of the plaintiffs and by Mr. Seller on behalf of the defendant.)

The Court: Will counsel approach the bench just a moment, please.

(Discussion was had by the Court and counsel off the record at the bench.)

The Court: Ladies and gentlemen of the jury; it becomes my duty to instruct you as to the law.

UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

I HEREBY CERTIFY that the foregoing and attached Partial Transcript of Proceedings is a true record of proceedings had in the above entitled and numbered cause at the time and place herein stated, as stenographically recorded by me.

DATED at Albuquerque, New Mexico, this 7th day of December, 1964.

s/ JUANITA GODDING
U. S. Court Reporter